No. 48522-2-II

IN THE WASHINGTON COURT OF APPEALS
DIVISION II

SERVICE EMPLOYEES INTERNATIONAL UNION
LOCAL 925,
Appellant/Cross-Respondent,

v.

STATE OF WASHINGTON,
DEPARTMENT OF SOCIAL AND HEALTH SERVICES,
Respondent,

and

FREEDOM FOUNDATION,
Respondent/Cross-Appellant.

RESPONDENT/CROSS-APPELLANT FREEDOM FOUNDATION'S SUPPLEMENTAL BRIEF

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I. INTRODUCTION

On April 12, 2016, this Court published its opinion in *SEIU Healthcare 775 NW v. Department of Social & Health Services*, Cause No. 46797-6-II,[1] deciding several issues materially identical to those in this case. On April 27, this Court ordered "supplemental briefing discussing the effect of that opinion on each issue raised in this appeal." Appellant SEIU 925 filed its supplemental brief on May 9, 2016. This case and *SEIU 775* arise from virtually identical facts. Respondent/Cross-Appellant Freedom Foundation ("Foundation") requested from the Department of Social & Health Services ("DSHS") a list of Washington childcare providers whose constitutional rights were recently expounded by the U.S. Supreme Court in *Harris v. Quinn*, 134 S.Ct. 2618 (2014), so that the Foundation could educate them about their constitutional right to refrain from union membership and fee payments.[2]

In *Harris v. Quinn*, the U.S. Supreme Court held that forcing quasi-public employees who are not members of a union to pay compulsory union fees violates those employees' First Amendment rights. This lawsuit by

[1] Respondent/Cross-Appellant will cite to the decision as published in Westlaw's database. *See SEIU Healthcare 775NW v. State, Dep't of Soc. & Health Servs.* ("*SEIU 775*"), No. 46797-6-II, 2016 WL 1447304, at *1 (Wash. Ct. App. Apr. 12, 2016).

[2] In the *SEIU 775* case, the Foundation requested from DSHS a list of Washington Individual Providers (home healthcare providers), another group of quasi-public employees whose rights were affected by *Harris*.

SEIU 925 is nothing more than an attempt to prevent quasi-public employees from learning that they have been subjected to an unconstitutional scheme and from learning how to opt-out of that scheme, if they so desire.

The *SEIU 775* decision forecloses three of the four issues appealed by Appellant here: Appellant's "commercial purpose" (arising under RCW 42.56.070(9)) argument and its two personal information arguments (arising under RCW 42.56.230). The only substantive issue Appellant raises that *SEIU 775* did not address is the contention that disclosure of the instant records violates Appellant's members' right to privacy, guaranteed by Article I, § 7 of the Washington Constitution.[3]

Like in *SEIU 775*, Appellant here argues (in slightly modified iterations) that the Foundation's purpose for the list is "commercial" because the Foundation discusses its work when fundraising and because childcare providers equipped with the full knowledge of their rights under *Harris* may economically impact Appellant. This Court in *SEIU 775* addressed these

[3] *See* WASH. CONST. art. I § 7. Superior Courts have repeatedly rejected this argument in numerous cases. *See SEIU 925 v. DSHS & Freedom Foundation*, Thurston Co. Superior Ct. No. 14-2-02359-3 (May 1, 2015); *see also SEIU 925 v. DEL & Freedom Foundation*, Thurston Co. Superior Ct. No. 14-2-02082-9 (Jan. 28, 2016); *see also SEIU 925 v. DEL & Shannon Benn*, Thurston Co. Superior Ct. No. 16-2-01416-34 (Apr. 22, 2016). And generally speaking, Washington appellate courts have addressed this issue in the past. *See Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 123-24, 937 P.2d 154, *amended*, 943 P.2d 1358 (1997).

very arguments and rejected them. And, while Appellant contends that its "personal information" arguments in this case differ from those raised in *SEIU 775,* they do not. They are precisely the same.

In this case, the Foundation cross-appealed three issues and requested an award of reasonable attorneys' fees. The Foundation cross-appealed these same issues in *SEIU 775*, but the Court explicitly declined to reach them. *See SEIU 775*, at *1, n. 2. Moreover, the Court in *SEIU 775* denied the Foundation's request for reasonable attorneys' fees requested under equitable principles. *Id.* at *16. While the Foundation's request for fees is likely foreclosed by SEIU 775's decision, this Court should address the Foundation's cross-appealed arguments.

II. ARGUMENT

A. This Court in *SEIU 775* defined the scope and application of RCW 42.56.070(9)'s "commercial purpose" provision, and that holding applies identically to the "commercial purpose" argument raised by Appellant in this case.

As a matter of first impression, this Court in *SEIU 775* defined the scope and meaning of the commercial purpose prohibition in RCW 42.56.070(9). *SEIU 775*, at *8-9. In the process of statutory construction, the Court concluded that this prohibition must be interpreted like every other PRA exemption: in favor of disclosure. *Id.* at *10. To reach its adopted definition, the Court consulted dictionary definitions of "commercial" as well as

several Attorney General Opinions construing RCW 42.56.070(9). The Court further determined that a requestor must intend to profit (or generate revenue/financial gain) from the *direct* use of the list it is requesting. *Id.* at *11-12. Ultimately, the Court defined "commercial purpose" as *the intention "to generate revenue or financial benefit from the direct use of the lists.*" *Id.* at *13 (emphasis added).[4]

The appellant in *SEIU 775* alleged several ways that the Foundation would commercially benefit from its use of the records (contacting providers to inform them of their constitutional rights). *SEIU 775*, at *13-14. First, the Court addressed the allegation that the Foundation's use of the list is commercial because it will economically injure SEIU. *Id.* at *13.

> First, SEIU [775] argues that the Foundation's actions will economically injure SEIU, including by decreasing SEIU's membership and funds. SEIU suggests that this use constitutes a commercial purpose because the Foundation perceives SEIU as an "economic competitor." Economically injuring SEIU would not directly generate revenue or financial benefit for the Foundation. Even if SEIU ceases to exist there will be no direct financial benefit to the Foundation. Therefore, economically injuring SEIU does not fall within the definition of "commercial purposes" that we adopt above. We decline to hold under the facts of this case that a nonprofit entity decreasing the revenue of another nonprofit entity is a type of commercial purpose under RCW 42.56.070(9).

[4] Nowhere in its supplemental brief does Appellant state the full commercial purpose test adopted by the Court in *SEIU 775*. When Appellant does reference it, it misstates or incompletely states the scope of the commercial purpose test adopted by the *SEIU 775* Court. *See* Appellant SEIU 925's Supp. Brf. at 2.

Id. at *13. The Court also applied the test to the appellant's allegation that the Foundation will increase its own membership and funds from its use of the records. *Id.* at *14.

> Second, SEIU argues that the Foundation's actions will increase the Foundation's membership and funds. However, SEIU does not explain how contacting the individual providers would directly increase membership or donations. The Foundation emphasizes that it will not solicit donations from the individual providers. There also is no indication that the Foundation will ask individual providers to become Foundation members. SEIU argues that the Foundation fundraises by broadly publicizing its goal to defund SEIU and therefore attacking SEIU may generate donations. However, SEIU does not explain how merely obtaining the lists and contacting the individual providers will cause others to join the Foundation or donate money to the Foundation. Any such a benefit is too attenuated to constitute a commercial purpose.

Id. Notably, in Appellant SEIU 925's supplemental brief, it argues that *SEIU 775*'s reasoning does not apply to the Foundation's intentions in this case because the "Foundation's purpose here was directly to increase its own revenue, and to decrease that of SEIU 925." Appellant's Supp. Brf. at 3. These are the same unsuccessful arguments pressed by appellant's counsel in *SEIU 775* (notably, the instant Appellant and the *SEIU 775* appellant are both represented by the same law firm).[5]

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[5] In *SEIU 775*, appellant's counsel argued that the Freedom Foundation's

> intent is [] clearly 'commercial' insofar as it . . . economically benefit[s] itself by providing it a means to fundraise both from the IPs directly and from past donors, other entities and the public at large by publicizing its efforts to 'defund' SEIU and public sector unions generally through contacts with the thousands of IPs."

Appellant attempts to distinguish the current case by arguing that, in addition to its purpose of contacting providers and notifying them of their rights, the "Foundation had other equally important motivations for requesting the records, including to economically benefit itself and to inflict economic injury on Local 925." Appellant's Supp. Brf. at 3. In support of this contention, Appellant presents "new evidence" to the Court—specifically, several Freedom Foundation fundraising communications sent to donors discussing its worker education programs. It makes no difference whether the Court allows Appellant to introduce this "new evidence," because it is simply Appellant's attempt to repackage the exact same facts present in *SEIU 775*.[6]

The problem with Appellant's theory is that it fundamentally misunderstands (either deliberately or ignorantly) how regular nonprofit charities function and why they exist. Organizations like the Foundation exist to accomplish some approved mission—not to fundraise, although

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Brf. of Appellant SEIU 775 at 33, *SEIU 775*, *available at* https://www.myfreedomfoundation.com/sites/default/files/documents/legal/SEIU775-APP-BRF.pdf (last visited May 18, 2016). As appellant's counsel pointed out in *SEIU 775*, the case was before the Court of Appeals on "essentially a CR 12(b)(6) standard" because the trial court decided to accept all of SEIU 775's allegations as true. *Id.* at 32. The very commercial purpose arguments advanced by SEIU 925 in this case were rejected by the Court of Appeals in *SEIU 775*. No amount of window-dressing by SEIU 925's counsel can change the fact that it is seeking a second bite at the same apple.

[6] Just like the *SEIU 775* case, "[t]he Foundation emphasizes that it will not solicit donations from the [childcare] providers[,] and [t]here also is no indication that the Foundation will ask [childcare] providers to become Foundation members. *SEIU 775*, at *14; CP 337-38.

they must do the latter to accomplish the former. For instance, the Foundation's current mission statement reads thus: "Our mission is to advance individual liberty, free enterprise, and limited, accountable government."[7] One of the ways the Foundation accomplishes this mission is to educate public employees, including childcare providers, "about their constitutional rights to drop their membership in and payment of fees to public sector unions." *SEIU 775*, at *1 (referring to this work as "[o]ne of the Foundation's central purposes").

In order to perpetuate and continue its work in support of this mission, the Foundation—like any charity—must raise voluntary support from individuals who support the Foundation's mission and work. But the fact that the Foundation must, by necessity, engage in fundraising in which it explains to current and prospective donors how it is fulfilling its organizational purpose does not transform fundraising into a purpose of the organization. Likewise, the fact that the Foundation fundraises by citing the successes of its worker education programs does not transform fundraising into a purpose of its worker education programs. In sum, Appellant's argument makes no sense at all. No amount of creative writing can change the reality that the Court considered the very same scenarios in *SEIU 775*

[7] *See* FREEDOM FOUNDATION, *available at* http://www.myfreedomfoundation.com/ (last visited May 17, 2016).

and concluded that "Any such a [funding and membership] benefit[s] [derived from obtaining the list and contacting providers] is too attenuated to constitute a commercial purpose." *Id.* at *14.

As to Appellant's second allegation—that the Foundation's communication with providers will economically injure SEIU—this Court's holding in *SEIU 775* is enough: "Therefore, economically injuring SEIU does not fall within the definition of "commercial purposes" that we adopt above. We decline to hold under the facts of this case that a nonprofit entity decreasing the revenue of another nonprofit entity is a type of commercial purpose under RCW 42.56.070(9). *SEIU 775*, at *13.

The Foundation's purpose for the instant records is identical to its purpose for the records in *SEIU 775*. Accordingly, Appellant's commercial purpose argument is entirely controlled by this Court's opinion in *SEIU 775*. This Court should wholly reject it here as it did there.

B. This Court in *SEIU 775* correctly disposed of the "tantamount" and "linkage" arguments as it related to the exemptions in RCW 42.56.230, and the Court should likewise dispose of the identical arguments raised by Appellant in this case.

In *SEIU 775*, this Court held that a list of Individual Providers was not exempted by RCW 42.56.230(1). The appellant there argued the exemption applied because a requestor could hypothetically use the list of Individual Providers to discover, through other means, the personal information of the

provider's clients—welfare recipients. The Court concluded that prior authority from the Supreme Court[8] and Division One of this Court[9] controlled. These precedents clearly stand for the proposition that PRA exemptions may not be expanded beyond their plain language under a "linkage" analysis. *Koenig*, 158 Wn.2d at 183 (holding that a court may not "look beyond the four corners of the records at issue to determine whether they were properly withheld[,]" or "rewrite [a PRA exemption] or construe it in a manner contrary to its unambiguous text."); *see also Sheehan*, 114 Wn. App. at 345-46 (rejecting the "'linkage' argument, that is, that any information, no matter how public it may be, is nondisclosable if it could somehow lead to other, private information tracked down from other sources).

Appellant claims that their arguments in this case are different. Appellant's Supp. Brf. at 9-11. Appellant is mistaken. First, Appellant seeks to prevent disclosure under the same exemption. *See* Appellant's Opening Brf. at 3; RCW 42.56.230(1) (exempting "personal information in any files maintained for… welfare recipients."). *SEIU 775* forecloses this issue.[10]

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[8] *Koenig v. City of Des Moines*, 158 Wn.2d 173, 142 P.3d 162 (2006).
[9] *King County v. Sheehan*, 114 Wn. App. 325, 57 P.3d 307 (2002).
[10] Appellant admits, *see* Appellant's Supp. Brf. at 9, that this "welfare recipient" argument is foreclosed by *SEIU 775*, but fails to properly explain *why* the Court rejected it. There, the Court remarked that the records were not exempted by RCW 42.56.230(1)'s plain language, and proceeded to evaluate whether it could be expanded to include a list of Individual Providers. *SEIU 775*, at *14-16 ("The fact that releasing the names of individual providers may effectively release the names of Medicaid beneficiaries, as in *Koenig*, or

However, Appellant also seeks to prevent disclosure under a different but similar exemption, RCW 42.56.230(2)(a)(ii) (exempting "personal information for a child enrolled in a public or nonprofit program serving or pertaining to children… including but not limited to early learning."). Appellant disclaims that, by asserting this exemption, it is employing the "tantamount" or "linkage" argument soundly rejected by this Court in *SEIU 775*, the Supreme Court in *Koenig*, and Division One in *Sheehan*. Appellant's Supp. Brf. at 9-10. But Appellant is making the same failed argument in different clothes.

The Foundation did not request a list of children described in RCW 42.56.230(2)(a)(ii). It requested a list of the state-funded childcare providers who provide care to those children. Therefore, the information DSHS will disclose in this case will not be the "personal information" of children.[11] As

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allow the requestor to discover the names of Medicaid beneficiaries through investigation, as in *Sheehan*, does not allow us to ignore the plain language of RCW 42.56.230(1).").

[11] As the Foundation explained in its Opening Brief at 32-33,

> "Personal information" is not defined by the PRA, but Washington case law has defined it as "information relating to or affecting a *particular* individual…" *Bainbridge Island Police Guild v. City of Puyallup*, 172 Wn.2d 398, 411-12, 259 P.3d 190 (2011) (emphasis added). The Merriam-Webster Dictionary defines "particular" as "used to indicate that *one specific person or thing is being referred to and no others*."38 The Foundation's requests seek information related to FFNs, not children or welfare recipients. As before, this "personal information" exemption must be "liberally construed" toward disclosure and "narrowly construed" toward nondisclosure, RCW 42.56.030, to honor the PRA's status as "a strongly worded mandate for broad disclosure of public records." *Hoppe*, 90 Wn.2d at 127. Thus, the records released must "indicate that one specific [child or welfare recipient] is being referred to and no others." That is not the case here.

the Foundation stated in its briefing:

> The Foundation requested lists of FFNs—not the children or welfare recipients for whom they care. In order to learn any details about the children or welfare recipients for whom those FFNs care, the Foundation would also have to possess other, additional information not in the requested records. The Foundation possesses none of this additional information[.]

Foundation's Reply Brf. at 20. The only way Appellant can establish that provider information "is necessarily also the personal information of a child," *see* Appellant's Supp. Brf. at 10, is by resorting to the "tantamount" or "linkage"[12] arguments explicitly rejected by this Court in *SEIU 775*. Contrary to Appellant's assertion, *SEIU 775*'s holding disposes of Appellant's argument under RCW 42.56.230(2)(a)(ii).

C. This Court in *SEIU 775* did not consider an argument that a list of Individual Providers was exempted from disclosure under Article I § 7 of the Washington Constitution.

In *SEIU 775*, this Court did not consider whether disclosure of a list of Individual Providers was exempted from disclosure by Article I § 7 of the Washington Constitution. Thus, this argument remains Appellant's sole substantive basis to seek nondisclosure. However, the trial court rightly rejected this argument below, *see* RP 01/09/15 at 39, and this Court should

[12] I.e., the disclosure of nonexempt Public Record A is tantamount to the disclosure of exempt Public Record B. The "tantamount" argument is facilitated by the "linkage" argument, "that is, that any information, no matter how public it may be, is nondisclosable if it could somehow lead to other, private information tracked down from other sources." *Sheehan*, 114 Wn. App. at 345-46. Both arguments have been rejected by Washington's appellate courts.

do so here.

D. This Court in *SEIU 775* explicitly refused to address whether the trial court erred by granting a TRO after acknowledging that Plaintiff-Appellant failed to meet the requisite standards to obtain a TRO, and this Court should address this issue now.

In *SEIU 775*, this Court explicitly declined to address whether the trial court erred by issuing an unmerited TRO. *SEIU 775*, at *1, n. 2. The Foundation has cross-appealed the same issue in the instant case and believes the Court should address it here. First, the Foundation rejects Appellant's contention that it somehow "confuses the elements of proof required for a TRO or preliminary injunction, compared to those required for a Permanent Injunction." Appellant's Supp. Brf. at 11. On the contrary, it is Appellant who misunderstands not only the difference between a TRO's purpose, *as opposed to the standard an applicant must meet to obtain one*, *see id.* at 12, but also the Foundation's basic argument. The Foundation does not argue that the trial court refused to apply a heightened standard of proof upon SEIU 925 at the TRO hearing; the Foundation asserts that the trial court failed even to apply the lower standard of proof necessary to obtain a TRO or preliminary injunction. *See* Foundation's Opening Brf. at 17; *see also* Foundation's Reply Brf. at 11-13.

SEIU 775 very coherently sets forth the standard a party must meet to obtain a TRO or preliminary injunction under RCW 42.56.540:

> In the context of RCW 42.56.540, a party seeking a TRO or preliminary injunction to prevent the disclosure of certain records must show a likelihood that an exemption applies and that the disclosure would clearly not be in the public interest and would substantially and irreparably damage any person or vital government functions.

SEIU 775, at *5. In *Does v. King County*, 192 Wn. App. 10, 21-22, 366 P.3d 936 (2015), Division One approved the trial court's recognition "that its first task was to determine whether a specific statutory exemption to the PRA applies. Only then could it consider the issuance of an injunction under RCW 42.56.540." *See also Franklin Cty. Sheriff's Office v. Parmelee*, 175 Wn.2d 476, 480, 285 P.3d 67 (2012); *see also Bainbridge Island Police Guild v. City of Puyallup*, 172 Wn.2d 398, 408, 259 P.3d 190 (2011) ("If an exemption does apply, we *then* decide whether the trial court properly enjoined production of the [public records] under the injunction requirements of RCW 42.56.540.") (emphasis added).

At the TRO hearing below, Appellant SEIU 925 was unable to demonstrate the threshold likelihood that an exemption applies to the list of childcare providers. RP 12/19/14 at 31-33; CP 375-77. Accordingly, the Foundation contends that the trial court erred in issuing the TRO on December 19, 2014 and extending it on January 9, 2015. No authority permits a trial court to enjoin the disclosure of public records where a third party has failed to show a likelihood that an exemption applies. *See SEIU*

775, at *5. TROs should not be granted as a matter of right, especially where third parties delay seeking injunctive relief until the last minute,[13] thus creating their own "emergency." Though TROs are intended to maintain the status quo, they "should not give the parties the full relief sought on the merits of the action." *See McLean v. Smith*, 4 Wn. App. 394, 399, 482 P.2d 798, 802 (1971). Nearly two years after the initial request, and without ever proving even the likelihood that an exemption applies, Appellant has succeeded in depriving the Foundation of the public records to which it is entitled. Because this issue has arisen in many other cases, including *SEIU 775*, and the unmerited granting of injunctive relief will likely continue to deprive requestors of their PRA rights, this Court should address the issue and clarify that an applicant must meet the standard set forth in *SEIU 775* to enjoin (even temporarily) the release of public records.

E. This Court in *SEIU 775* explicitly declined to address whether Plaintiff-Appellant SEIU 925 possesses standing to assert PRA exemptions in RCW 42.56.230 and the "commercial purpose" prohibition in RCW 42.56.070(9).

In *SEIU 775*, the Court declined to address the two standing issues cross-appealed by the Foundation. The Court should do so in this case. *SEIU 775*, at *1, n. 2.

[13] Foundation's Opening Brf. at 3-4.

F. This Court in *SEIU 775* did not award Freedom Foundation its reasonable attorneys' fees under equitable principles.

In *SEIU 775*, the Foundation requested that the Court award it the reasonable attorneys' fees it was forced to expend in dissolving the trial court's TRO. *Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 143, 937 P.2d 154, amended, 943 P.2d 1358 (Wash. 1997) ("A temporary restraining order is 'wrongful' if it is dissolved at the conclusion of a full hearing."). The award is discretionary and its purpose "is to deter plaintiffs from seeking relief prior to a trial on the merits. The purpose of the rule would not be served where injunctive relief prior to trial is necessary to preserve a party's rights pending resolution of the action." *SEIU 775*, at *16. The Court in *SEIU 775* concluded that "a trial on the merits would also have been fruitless had the trial court lifted the TRO." *Id.* at *16.

Importantly, *SEIU 775*'s ruling on equitable attorneys' fees does not address the issue of whether the trial court erred by granting SEIU 925 a TRO in the first place. *See* § II(D), *supra*. The availability of an award of attorneys' fees under this equitable rule appears to turn on whether a subsequently-dissolved TRO/preliminary injunction served the purpose of "preserv[ing] a party's rights pending resolution of the action." *SEIU 775*, at *16 (quoting *Confederated Tribes of Chehalis Reservation v. Johnson*,

135 Wn.2d 734, 758, 958 P.2d 260, 271 (1998)). In light of this Court's application of *Confederated Tribes* to the facts of the *SEIU 775* case, the Foundation does not ask this Court to reach a different result in this case—which is virtually identical to *SEIU 775*. Moreover, the Foundation does not presume to ask this Court to review or alter the Supreme Court's holding in *Confederated Tribes*, but the Foundation intends to preserve this issue should this matter proceed to discretionary review before that Court.

Though the Foundation contends that the trial court's TRO was wrongfully issued by the trial court, *SEIU 775* controls on the Foundation's instant claim for attorneys' fees under equitable rules. *See SEIU 775*, at *16.

RESPECTFULLY SUBMITTED on May 19, 2016.

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Kirsten Nelsen

FREEDOM FOUNDATION

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